STATES OF JERSEY

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DRAFT EMPLOYMENT (AMENDMENT No. 2) (JERSEY) LAW 200- (P.270/2005): COMMENTS

Presented to the States on 17th January 2006
by the Minister for Social Security

STATES GREFFE

COMMENTS

The Minister for Social Security has considered the amendment but is unable to support it. The Minister therefore would ask members to reject the amendment for the reasons given below –

(1) Deputy Southern's accompanying report states that the amendment is brought to address the failure of the Island's employment laws regarding an individual's right to representation in a grievance of disciplinary matter. The Minister considers that this amendment is unnecessary as very detailed provisions for employees' rights to representation have already been included in a Code of Practice made under the Jersey Advisory and Conciliation (Jersey) Law 2003, "Disciplinary and grievance practice and procedures in employment", which is attached at the Appendix.

(2) The Code of Practice was prepared by the Jersey Advisory and Conciliation Service following public consultation, and was approved by the previous Employment and Social Security Committee. The final draft of the Code has been available to the public since June 2005 and is reported to have worked very well in practice.

(3) Deputy Southern himself states in his accompanying report that the amendment "*serves to place 'best practice' where it belongs, in the Island's employment law"*, however the Minister is convinced that good practice is more commonly incorporated in guidelines or Codes of Practice, rather than in primary legislation. The Employment Law provides an appropriate procedure for consultation upon, and Ministerial approval of, Codes of Practice. Therefore, these Codes have 'teeth' in Law and the Employment Tribunal would take into consideration the matter of unfair process if representation was denied.

(4) The Minister notes that there are significant differences from the equivalent U.K. provisions for the right to representation and Deputy Southern's amendment provides much more extensive rights. For example –

- the U.K. provides that a person may **reasonably request** representation in specified types of disciplinary or grievance hearing and sets criteria defining who the representative might be. However, Deputy Southern's amendment would provide an absolute right (not by request) to be represented in any unspecified disciplinary or grievance matter, by any person the employee wishes to represent them.

- In the U.K., as a remedy for complaints relating to breach of the right to representation, 2 weeks' pay is the maximum that may be awarded, however Deputy Southern's provisions allow an award of up to 13 weeks' pay. The remedy also introduces the right to reinstatement following unfair dismissal, a provision that is not available for breach of any other part of the Employment Law.

The Minister considers that the amendment to the Employment Law should be rejected for the reasons given above.

APPENDIX

CODE OF PRACTICE

Disciplinary and grievance practice and procedures in employment

Introduction

1. Under the terms of Article 9 of the Jersey Advisory and Conciliation Law 2003, the Employment and Social Security Committee is empowered to issue or approve Codes of Practice providing practical guidance for the purpose of promoting the improvement of employment relations. This Code is intended to provide such guidance on the development and operation of disciplinary and grievance procedures.

2. The provisions of this Code are admissible in evidence and may be taken into account in determining any question arising in proceedings before the Employment Tribunal or a court. Failure to observe any provision of the Code does not, of itself, render a person liable to any proceedings.

   Whilst every effort has been made to ensure that the summary of the relevant statutory provisions included in the Code is accurate, only the Employment Tribunal and the courts can interpret the law authoritatively.

Section 1 – Disciplinary procedures

Why have disciplinary rules and procedures?

3. Whilst employers are not required by statute to have disciplinary rules and procedures it is good employment relations practice so as to promote fairness and order in the treatment of individuals and in the conduct of employment relations. They also assist an organisation to operate effectively. Rules set standards of conduct at work; procedures help to ensure that the standards are adhered to and also provide a fair method of dealing with alleged failures to observe them.

4. It is important that employees know what standards of conduct are expected of them. Further, the Employment Law 2003 requires employers to provide written information for their employees in relation to any disciplinary rules and procedures that are relevant *(1).*

5. The importance of disciplinary rules and procedures has also been recognised in legislation, which allows for the fairness of a dismissal to be challenged before the Employment Tribunal. Although an employee's "conduct" is recognised by that legislation *(2)* as a potentially valid reason for dismissal, the section further states that a dismissal must be reasonable in all the circumstances *(3).* This means that not only should dismissal be appropriate to the seriousness of the particular situation, but also the steps taken by the employer before deciding to dismiss ought to conform to a certain standard. Where a dismissal is found by the Tribunal to have been unfair, the employer is liable to pay compensation to the employee.

Formulating Policy

6. Managers are responsible for maintaining discipline and for ensuring that there are satisfactory disciplinary rules and procedures. However, if they are to be effective, the rules and procedures need to be accepted as reasonable both by those who are covered by them and by those who operate them. Employers should therefore aim to secure the involvement of employees when formulating new or revising existing rules and procedures. Where a trade union or staff association is recognised it would often be appropriate for its officials to participate in developing the procedures.

Rules

7. It is unlikely that any set of disciplinary rules can cover all circumstances; moreover the rules will vary according to particular circumstances such as the type of work, working conditions and size of establishment. When drawing-up rules the aim should be to specify clearly and concisely those necessary for the efficient and safe performance of work and for the maintenance of satisfactory relations within the workforce and between employees and their employer. Rules should not be so general as to be meaningless.

8. Rules should be readily available and managers should make every effort to ensure that employees know and understand them. This may be best achieved by giving every employee a written copy of the rules *(4)*. In the case of new employees this should form part of an induction programme. Special allowance should be made for individuals whose first language is not English or who have a visual impairment or some other disability.

9. Employees should be made aware of the likely consequences of breaking rules. In particular they should be given a clear statement of the type of conduct that may warrant summary dismissal. If a rule prohibiting certain conduct has fallen into disuse through not having been the subject of recent disciplinary action, it is important that employees are given notice by their employer that the rule will again apply. This approach should be adopted even if the rule is written.

Essential features of disciplinary procedures

10. Disciplinary procedures should not be viewed primarily as a means of imposing sanctions. They should be designed to emphasize and encourage improvements in individuals' conduct. In this way, the reasonable and consistent use of disciplinary rules and procedures will benefit employers in promoting good employee relations and in reducing the number of issues that arise for consideration.

11. Disciplinary procedures should:

(a) Be in writing.

(b) Specify to whom they apply.

(c) Not discriminate against any employee because of their sex, race, colour, language, religion, political view or any other status.

(d) Provide for matters to be dealt with quickly.

(e) Indicate the disciplinary actions which may be taken and specify the normal duration of warnings.

(f) Specify those managerial and/or supervisory levels who have authority to take the various forms of disciplinary action, ensuring that immediate superiors do not normally have the power to dismiss without reference to senior managers.

(g) Provide for employees to be informed of the complaints against them and, where possible, all relevant evidence before any hearing.

(h) Provide employees with an opportunity to state their case before a decision is reached.

(i) Give an individual the right to be accompanied by a fellow employee of his/her choice or, where a union is recognised, by a trade union representative.

(j) Ensure that, except for gross misconduct, an employee is not dismissed for a first incident of

misconduct.

(k) Ensure that disciplinary action is not taken until the case has been investigated properly, and in a manner appropriate to the circumstances.

(l) Provide for a written explanation for any penalty imposed.

(m) Include a right of appeal and specify the procedure to be followed.

The procedure in operation

12. When a disciplinary matter arises, the supervisor or manager should establish the facts promptly before recollections fade, taking into account the statements of any available witnesses, which should be recorded in writing. In serious cases consideration could be given to a brief period of suspension while the case is investigated. This suspension should be with pay unless the circumstances justify otherwise.

The employee should be advised of their rights under the procedure, including the right to be accompanied. Before a decision is made the employee should be interviewed and given the opportunity to state their case. The employee should be given sufficient time to prepare their case and the written records of any witnesses' statements should be made available to the employee (although in exceptional circumstances they may be amended, but only to maintain anonymity). If the employee challenges the statement it may clarify matters if the witness attends the interview, provided the witness is willing to do so.

13. After investigation and interview, it may be that a situation can be best dealt with informally or by counselling the employee. Counselling may help if the employee's actions are caused, or contributed to by medical, psychological or private circumstances. In many such cases, professional support will be important. In such cases it may be inappropriate to continue with the disciplinary procedure.

14. Often supervisors will give informal oral warnings for the purpose of improving conduct after minor infringements of standards of conduct. However, where the facts of a case appear to call for disciplinary action, other than summary dismissal, the following procedure should normally be observed:

(a) In the case of minor offences the employee should be given a formal oral warning, or if the issue is more serious, a written warning setting out the nature of the offence and the likely consequences of further misconduct. In either case the employee should be advised that the warning is the first formal stage of the procedure.

(b) Further misconduct might warrant a final written warning which should contain a statement that any recurrence would lead to suspension, transfer demotion or dismissal, as the case may be.

(c) The final step might be disciplinary suspension without pay or transfer or demotion (but only if these are allowed for by an express or implied condition of the contract of employment), or dismissal, according to the nature of the misconduct. Suspension without pay should be treated with caution. It should not normally be for a prolonged period.

15. Any disciplinary sanction should be confirmed in writing to the employee and should include details of any right of appeal, how to make it and to whom, even if the employee has previously received a written procedure outlining this.

16. When deciding the disciplinary action to be taken the supervisor or manager should bear in mind the test of reasonableness in all the circumstances. This means that, after investigation and interview, the employer should be able to demonstrate if called upon to do so that there are reasonable grounds for believing that the employee has committed the act(s), which are the subject of the disciplinary proceedings. So, at the very least, the supervisor or manager should consider it more likely than not that the employee is responsible. This standard should be applied not only to decisions regarding dismissal but

also to those concerning warnings or other measures. So far as is possible, account should be taken of the employee's record and any other relevant factors – although consistency of overall standards is important, each case must be considered on its merits, including an employee's particular situation.

17. Special attention should be given to the way in which disciplinary procedures are to operate in certain cases. For example:

(a) Employees to whom the full procedure is not immediately available. Provision may have to be made for the handling of disciplinary matters among nightshift workers, workers in isolated locations or depots or others who may pose particular problems, for example because no-one is present with the necessary authority to take disciplinary action.

(b) Trade union officials. Disciplinary action against a trade union official can lead to a serious dispute if it is seen as an attack on the union's functions. Although normal disciplinary standards should apply to officials' conduct as employees, where the union is recognised, no disciplinary action beyond an oral warning should be taken until the case has been discussed with a senior trade union representative or fulltime official.

(c) Criminal offences outside employment. These should not be treated as automatic reasons for dismissal. The main considerations should he whether the offence is one that makes the employee unsuitable for his or her work or in some circumstances, unacceptable to colleagues. Employees should not be dismissed solely because a charge against them is pending or because they are absent through having been remanded in custody for a short period. As such circumstance are likely to vary, appropriate advice should be taken, e.g. from JACS, before dismissing an employee in such circumstances.

Appeals

18. Grievance procedures can be used for dealing with individual disciplinary appeals. A preferred process of providing for an appeal, however, is through a specific provision in the disciplinary procedure.

Records

19. Records should be kept detailing the nature of a breach of disciplinary rules, the action taken and the reasons for it, whether an appeal was lodged, its outcome and any subsequent developments. These records should be kept confidential and retained in accordance with any relevant provisions of the Data Protection Law. The employee should be asked to sign the records to confirm that they represent an accurate and complete record of the meeting(s).

20. Except in special circumstances breaches of disciplinary rules should be disregarded after a specific period of satisfactory conduct, normally no more than twelve months. The duration of any warning should be communicated to the employee and recorded in any written warning given to the employee, particularly if that duration exceeds the normal period specified in a disciplinary procedure.

21. Rules and procedures should be reviewed periodically in the light of any developments in employment legislation or industrial relations practice to ensure their continuing relevance and effectiveness. Any amendments and additional rules imposing new obligations should be introduced and applied after reasonable notice has been given to all employees and, where appropriate, their representatives have been consulted. Changes to individual contracts should only be made with agreement, except in exceptional circumstances where advice should be sought.

Section 2 – Grievance procedures

Why have a grievance procedure?

22. In any organisation employees may have problems or concerns about their work, working environment or working relationships that they wish to raise and have addressed. A grievance procedure provides a mechanism for these to be dealt with fairly and speedily, before they develop into major problems and potentially collective disputes.

23. Whilst employers are not required by statute to have a grievance procedure it is good employment relations practice to provide employees with a reasonable and prompt opportunity to obtain redress of any grievance. Employers are statutorily required in the written statement of terms and conditions of employment to specify what grievance procedures are available to employees *(1).*

24. In circumstances where a grievance may apply to more than one person and where a trade union or staff association is recognised it may be appropriate for the problem to be resolved through collective agreements between the trade union(s)/staff association and the employer.

Formulating procedures

25. It is in everyone's best interest to ensure that employees' grievances are dealt with quickly and fairly and at the lowest level possible within the organisation at which the matter can be resolved. Management is responsible for taking the initiative in developing grievance procedures which, if they are to be fully effective, need to be acceptable to both those they cover and those who have to operate them. It is important therefore that senior management aims to secure the involvement of employees and their representatives, including trade unions where they are recognised, and all levels of management when formulating or revising grievance procedures.

Essential features of grievance procedures

26. Grievance procedures enable individuals to raise issues with management about their work, or about their employers', clients' or their fellow workers' actions that affect them. It is impossible to provide a comprehensive list of all the issues that might give rise to a grievance but some of the more common include: terms and conditions of employment; health and safety; relationships at work; new working practices; organisational change and equal opportunities.

27. Procedures should be simple, set down in writing and rapid in operation. They should also provide for grievance proceedings and records to be kept confidential.

28. It is good practice for individuals to be permitted to be accompanied at grievance hearings, usually by a fellow employee of his/her choice or, where a union is recognised, by a trade union representative.

29. In order for grievance procedures to be effective it is important that all employees are made aware of them and understand them and if necessary that supervisors, managers and employee representatives are trained in their use. Wherever possible every employee should be either given a copy of the procedures or provided with access to it (e.g. in the personnel handbook or on the company intranet site). Special allowance should be made for individuals whose first language is not English or who have a visual impairment or some other disability.

The procedure in operation

30. Most routine complaints and grievances are best resolved informally in discussion with the employee's immediate line manager. Dealing with grievances in this way can often lead to speedy resolution of problems and can help maintain the authority of the immediate line manager who may well be able to resolve the matter directly. Both manager and employee may find it helpful to keep a note of such an informal meeting.

31. Where the grievance cannot be resolved informally it should be dealt with under the formal grievance procedure. The number of stages contained in the procedure will depend on the size of the organisation, its management structure and the resources it has available. It is for employers to decide the procedure suitable for their business, taking into account the need to develop a fair procedure. A model grievance procedure is appended to this code.

32. In most organisations it should be possible to have at least a two-stage grievance procedure. However, where there is only one stage, for instance in very small firms where there is only a single owner/manager, it is especially important that the person dealing with the grievance acts impartially.

33. In certain circumstances it may, with mutual agreement, be helpful to seek external advice and assistance during the grievance procedure. For instance where relationships have broken down an external facilitator might be able to help resolve the problem.

Special considerations

34. Although not required by law, some organisations may wish to have specific procedures for handling grievances about unfair treatment, e.g. discrimination or bullying and harassment, as these subjects are often particularly sensitive. Organisations may also wish to consider whether they need a whistle-blowing procedure. This provides strong protection to employees who raise concerns about wrongdoing (including frauds, dangers and cover-ups), but again is not required by law.

35. Sometimes an employee may raise a grievance about the behaviour of a manager during the course of a disciplinary case. Where this happens and depending on the circumstances, it may be appropriate to suspend the disciplinary procedure for a short period until the grievance can be considered. Consideration might also be given to bringing in another manager to deal with the disciplinary case.

Records

36. Records should be kept detailing the nature of the grievance raised, the employer's response, any action taken and the reasons for it. These records should be kept confidential and retained in accordance with any relevant provisions of the Data Protection Law. Copies of any meeting records should be given to the individual concerned although in certain circumstances some information may be withheld, for example to protect a witness. The employee should be asked to sign the records to confirm that they represent an accurate and complete record of the meeting(s).

37. All documents to be used in a disciplinary and grievance hearing must be fully disclosed by both parties within a specified time (e.g. within five days of the hearing).

Section 3 – Arranging for Disciplinary and Grievance Hearings

The right to be accompanied

38. The right to be accompanied (see paragraphs 12 and 28) is important to ensure a fair process. Most disciplinary and grievance procedures allow an employee to be accompanied by a work colleague, but some procedures extend the right to be accompanied to a "friend" who may or may not be an employee of the same organisation. Whatever decision is taken in this respect, it is advised that the procedure should specifically address this issue to prevent disagreement and/or confusion from arising.

39. It is good practice for an employer to try to agree a mutually convenient date for the disciplinary or grievance hearing with the employee and their companion. This is to ensure that hearings do not have to be delayed or postponed at the last minute. Where the chosen companion cannot attend on the date proposed the employee should be permitted to offer an alternative time and date so long as it is reasonable, e.g. before the end of the period of five working days beginning with the first working day after the day proposed by the employer. In proposing an alternative date the employee should have regard

to the availability of the relevant manager. For instance it would not normally be reasonable to ask for a new date for the hearing where it was known the manager was going to be absent on business or on leave unless it was possible for someone else to act for the manager at the hearing. The location and timing of any alternative hearing should be convenient to both employee and employer, but ultimately the employer may have to insist on a hearing taking place on a particular date.

40. Both the employer and employee should prepare carefully for the hearing. The employer should ensure that, where necessary, arrangements are made to cater for any disability the employee or their companion may have. Where English is not the employee's first language there may also be a need for translation facilities. The employee should think carefully about what is to be said at the hearing and, if permitted to be accompanied, should discuss with their chosen companion their respective roles at the meeting. Before the hearing the employee should inform the employer of the identity of their chosen companion.

41. The chosen companion, if such is permitted, should be permitted to address the hearing but should not answer questions on the employee's behalf. Companions have an important role to play in supporting a employee and to this end should be allowed to ask questions and should, with the agreement of the employer, be allowed to participate as fully as possible in the hearing. The companion should also be permitted reasonable time to confer privately with the employee, either in the hearing room or outside.

Footnotes

(1) Part 2 of the Employment (Jersey) Law 2003 requires employers to provide employees with a written statement of the main terms and conditions of their employment. Such statements must specify any terms and conditions relating to disciplinary and grievance procedures that are applicable. The employer may satisfy these requirements by referring the employees to a reasonably accessible document, which provides the necessary information.

(2) The Employment (Jersey) Law 2003, Article 64(2)(b).

(3) The Employment (Jersey) Law 2003 Article 64(4)(a) and (b) provides that "the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case".

(4) See footnote (1).

31st May 2005

Appendix: A model grievance procedure

First stage

Employees should put their grievance, preferably in writing, to their immediate line manager. Where the grievance is against the line manager the matter should be raised with a more senior manager. If the grievance is contested the manager should invite the employee to attend a hearing in order to discuss the grievance and should inform the employee of his or her right to be accompanied depending on the nature of the grievance. The manager should respond in writing to the grievance within a specified time (e.g. within five working days of the hearing or, where no hearing has taken place, within five working days of receiving written notice of the grievance). If it is not possible to respond within the specified time period the employee should be given an explanation for the delay and told when a response can be expected.

Second stage

If the matter is not resolved at Stage 1 the employee should be permitted to raise the matter in writing with a more senior manager. The choice of this person will depend on the organisation. The manager should arrange to hear the grievance within a specified period (e.g. five working days) and should inform the employee of the right to be accompanied. Following the hearing the manager should, where possible, respond to the grievance in writing within a specified period (e.g. ten working days). If it is not possible to respond within the specified time period the employee should be given an explanation for the delay and told when a response can be expected.

Final stage

Where the matter cannot be resolved at Stage 2 the employee should be able to raise their grievance in writing with a higher level of manager than for Stage 2. The choice of this person will depend on the organisation Employees should be permitted to present their case at a hearing and should be informed of their right to be accompanied. The manager dealing with the grievance should give a decision on the grievance within a specified period (e.g. ten working days). If it is not possible to respond within the specified time period the employee should be given an explanation and told when a response can be expected.